

June 28, 2001

**OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON**

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REPORT AND DECISION ON CODE ENFORCEMENT APPEAL

SUBJECT: Department of Development and Environmental Services File No. **E0001958**

NATHAN DUNHAM
Code Enforcement Appeal

Location: 68XXX – 329th Avenue Northeast/329XX Northeast 70th Street

Appellant: **Nathan Dunham**
2829 Lake Langlois Road NE
Carnation, WA 98014
Telephone: (425) 333-4965

King County: Department of Development and Environmental Services,
Site Development Services Division, Code Enforcement Section,
represented by Joan Snyder
900 Oakesdale Avenue SW
Renton, WA 98055-1219
Telephone: (206) 296-7149
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DECISION SUMMARY:

Department's Preliminary Recommendation:	Deny
Department's Final Recommendation:	Deny
Examiner's Decision:	Deny

EXAMINER PROCEEDINGS:

Notice of appeal received by Examiner:	March 16, 2001
Pre-Hearing Conference:	April 20, 2001
Hearing Opened:	June 11, 2001
Hearing Closed:	June 22, 2001

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes.
A verbatim recording of the hearing is available in the office of the King County Hearing Examiner.

ISSUES/TOPICS ADDRESSED:

- Grading
- Filling
- Sedimentation
- Sensitive Areas
- Wetlands
- Wetland Buffers
- Erosion

SUMMARY:

Dismisses code enforcement action regarding activities alleged to have occurred without a valid Right-Of-Way Use Permit; denies appeal from code enforcement action regarding grading and stockpiling earth materials within protected sensitive areas.

FINDINGS, CONCLUSIONS & DECISION: Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS:

1. **Notice and order served.** On January 24, 2001, the King County Department of Development and Environmental Services (“DDES” or “Department”) served notice of King County Code Violation; Civil Penalty Order; Abatement Order; Notice of Lien; Duty to Notify (“Notice and Order”) upon Nathan Dunham (“Appellant”) regarding grading, filling and stockpiling activities in the vicinity of 329th Avenue Northeast at Northeast 70th Street, in the Carnation vicinity of northeast King County. In that notice and order, the Department cited the Appellant for the following activities:
 - a. Grading in excess of 100 cubic yards and/or filling in excess of 3 feet in depth and/or excavating in excess of 5 feet in depth without a valid grading permit (KCC 16.82.060 and KCC 21A.24.320).
 - b. Clearing and grading within a sensitive area (wetlands and its associated buffer) without the required permits and/or approvals (KCC 16.82.060 and KCC 21A.24.320).
 - c. Privately improving the county road right-of-way without required permits and/or approvals pursuant to KCC 14.28.020. Following the Dunham appeal, the Department further investigated this charge (responding to Mr. Dunham’s statement of appeal) and subsequently withdrew this citation. Consequently, in the decision and order which conclude this examiner’s report, that portion of this case regarding “privately improving the county road right-of-way without required permits” is dismissed.
 - d. Inadequate or no temporary or permanent erosion sedimentation or drainage control measures in place (KCC 16.82.100).Regarding citations a., b., and c. as described here, the notice and order demands that the Appellant “immediately stop all work” and “apply for and obtain a valid grading permit.”
2. **Appeal filed.** The Appellant timely filed appeal from the notice and order. Because the case is dismissed regarding those aspects involving unauthorized work within a county right-of-way, appeal arguments will not be reviewed here. Regarding the other issues raised by the notice and order, the Appellant argues:

- a. That the stockpiled materials at issue are within “an existing road prism approved and required by King County.”
 - b. That regardless of the “adequacy” of erosion control measures taken, acceptable results are accruing.
 - c. That a new grading permit is not required, because the cited work was undertaken pursuant to short subdivision approval.
3. **Relevant facts.** The following facts are relevant to the issues raised in this appeal review:
- a. The northward extension of 329th Avenue Northeast comes to a “T” intersection with a roadway alignment designated Northeast 79th Street. Northeast 79th Street stubs westward from that intersection by private easement across tax lot no. 31. Precise survey or measurements regarding the improved roadway location and the location of the stockpiled earth and gravel material at issue are not available. However, both the roadway and the stockpiling are located within and/or immediately adjacent to that westward Northeast 79th Street stub.
 - b. The Department and the Appellant agree that the stockpile at issue pitches to at least 7 feet in height. They further agree that it is comprised of several hundred cubic yards of earth and gravel material. The Appellant concedes that he put much of the material there, particularly the most recent depositions which include gravel, presumably placed for “mulching” purposes. However, he testifies that the stockpile has been built by a number of neighboring residents who use the roads in the vicinity over a period of several years. When shown photographic evidence indicating substantial stockpile growth during the year 2000, the Appellant denied any involvement in the stockpiling activities during that year.
 - c. The Appellant’s protests notwithstanding, the earth and gravel materials of concern have been placed in a wetland. The expert testimony of record (Gillen) conclusively confirms that. The wetland character is confirmed by the presence of water, location of the area with respect to a seasonal stream, hydric soils and hydrophytic vegetation.¹
 - d. The Appellant argues that the fill materials of concern were placed “within the roadway prism” and therefore should qualify for exemption from permit regulation. He notes that the definition of roadway prism in King County code is not clearly stated and that, further, he has received differing descriptions of the term from different DDES employees. One told him that it was the “roadway surface” whereas another told him it was from “toe to toe” of the roadway section. Based on this confusion, he concluded that the term roadway “prism” referred to anything within the road easement or right-of-way. Of course, neither of the county employee descriptions of the term allow for such a generously expansive view of the term.
 - e. The Appellant also argues that King County Fire Code requires a 20-foot wide unobstructed driving width on an all weather driving surface for “all residences”. The

¹ Although the vegetation identified by Mr. Gillen is merely “wetland adaptable” rather than “wetland dependent,” two out of three of the Federal Wetland Designation criteria are satisfied, all that is required to definitively establish wetland presence. In addition, Mr. Gillen’s professional judgement carries some weight.

DDES staff argues that this requirement applies to new construction. Such requirements do not necessarily exempt one from required permits.

4. **Department Report Adopted.** Except as noted above, the facts and analysis contained in the Land Use Services Division Preliminary Report dated June 11, 2001 are correct and are incorporated here by reference. A copy of the Land Use Services Division report will be attached to those copies of the examiner's report which are submitted to the King County Council.

CONCLUSIONS:

1. As noted in finding no. 2, above, the Department withdraws its case regarding earlier allegations of unauthorized grading without a right-of-way permit. That aspect of this case will therefore be dismissed.
2. That portion of the appeal regarding general grading/filling without a required permit (that is, grading in excess of 100 cubic yards or other determinations of the specific amounts hauled, graded or otherwise stockpiled at the site of concern, have not been identified). The Appellant, while forthrightly conceding his participation in building the stockpile, denies that he built most of it and the Department has not disproven that testimony.

The Appellant and Department seem to agree that others participated in the stockpiling program, but neither has come forward with the names. The Department has cited no one other than Mr. Dunham. Mr. Dunham has not provided the names of anyone else. If they were known, perhaps they could be cited (presuming that evidence were available indicating their involvement). Nonetheless, this hearing record, has no evidence that 100 cubic yards or more of that stockpile was accumulated specifically by this Appellant; nor does the hearing record show that this Appellant contributed more than 3 feet of that 7 foot stockpile height.

3. Regarding those aspects of this case involving wetlands and wetland buffers, the appeal will be denied. The expert evidence of record shows that the stockpiling activities have occurred within a wetland which meets the full criteria and definition of wetland. By his own concession, Appellant Dunham has placed earth and gravel materials within that protected wetland/buffer-sensitive area.
4. None of the Appellant's arguments for "exemption" apply in this case. The Fire Marshall requires all residences in King County to have roofs. That does not mean that a citizen is free to construct a roof without a building permit. By the same token, one may not go around depositing fill materials in a protected wetland/wetland buffer or other sensitive area simply because one is doing roadway work within a right-of-way or someone is seeking to achieve compliance with some fire standard.
5. Regardless of the alleged "adequacy" of the erosion/sedimentation measures taken, clearly no timely effort was made.
6. KCC 23.24.070.B requires that, "civil penalties assessed create a joint and several personal obligation in all persons responsible for code compliance." Because it is a "joint and several personal obligation" the Appellant is responsible for the entire stockpile by virtue of his having participated in its build-up. The order below necessarily follows from this conclusion of law. If

more people had been cited by the Department, if Appellant Dunham had indicated who the other participants were, then perhaps they could have shared responsibility for compliance with the order below. Since these other participants are unknown to this hearing record, Appellant Dunham will alone bear the responsibility for code compliance.

DECISION:

- A. Regarding alleged grading within a County right-of-way without right-of-way use permit, the matter is DISMISSED.
- B. Regarding grading within excess of 100 cubic yards and/or filling in excess of 3 feet in depth, the appeal is GRANTED for the reasons indicated in conclusion no. 2 above.
- C. Regarding grading or filling within a protected sensitive area (wetland and its associated buffer), the appeal is DENIED for the reasons indicated in conclusion no. 3 above.
- D. Regarding the citation for inadequate or no temporary or permanent erosion/sedimentation control, the appeal is DENIED.

ORDER

Appellant Dunham shall apply for and obtain a valid grading permit. The completed application shall be submitted to the King County Land Use Services Division **no later than August 30, 2001**. By this date a complete application shall be submitted, which means that necessary preapplication meetings and “draft” applications should have been tested with the appropriate DDES personnel well before the August 30, 2001 deadline.

Appellant Dunham shall comply with the August 30, 2001 deadline or shall incur an initial civil penalty in the amount of \$1,000. Failure to comply with this order by **October 1, 2001** shall result in an additional civil penalty in the amount of \$1,500. Failure to comply by **November 16, 2001** shall result in assessment of yet another \$2,000 civil penalty.

Nothing in this order precludes the Prosecuting Attorney of King County or the Department of Development and Environmental Services from pursuing other and additional lawful means of prosecution regarding this matter.

King County may proceed to abate the violation(s) and cause the work to be done and charge the costs as a lien against the real property of all persons responsible for code compliance and as a joint and several personal obligation of all persons responsible for code compliance. In this case, that means Appellant Dunham.

ORDERED this 28th day of June, 2001.

R.S. Titus, Deputy
King County Hearing Examiner

TRANSMITTED this 28th day of June, 2001, to the following parties and interested persons:

Nathan Dunham
2829 Lake Langlois Road NE
Carnation WA 98014

Roger Bruckshen
DDES/BSD
Code Enforcement Section
MS OAK-DE-0100

Randy Sandin
DDES/LUSD
Site Development Services
MS OAK-DE-0100

Joan Snyder
DDES/LUSD
Site Development Services
MS-OAK-DE-0100

Heather Staines
DDES/BSD
Code Enforcement-Finance
MS OAK-DE-0100

Fred White
DDES/LUSD
Site Development Services
MS OAK-DE-0100

Pursuant to Chapter 20.24, King County Code, the King County Council has directed that the Examiner make the final decision on behalf of the County regarding code enforcement appeals. The Examiner's decision shall be final and conclusive unless proceedings for review of the decision are properly commenced in Superior Court within twenty-one (21) days of issuance of the Examiner's decision. (The Land Use Petition Act defines the date on which a land use decision is issued by the Hearing Examiner as three days after a written decision is mailed.)

MINUTES OF THE JUNE 22, 2001 PUBLIC HEARING ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES' FILE NO. E0001958 – NATHAN DUNHAM CODE ENFORCEMENT APPEAL.

R.S. Titus was the Hearing Examiner in this matter. Participating at the hearing were Fred White, and Nick Gillen representing the County; and Nathan Dunham.

The following exhibits were offered and entered into the hearing record:

- Exhibit No. 1 Staff Report to the Hearing Examiner
- Exhibit No. 2 Thomas Brothers map of area in question
- Exhibit No. 3 Assessor's map of area in question
- Exhibit No. 4 Withdrawn
- Exhibit No. 5 2000 Aerial photo printed from King County DDES GIS demonstrating area in question
- Exhibit No. 6 1990 Aerial photos dated 8/12/1990 of site at scale of 1" = 1000'
- Exhibit No. 7 1999 Aerial photos dated August 1999 of site at scale of 1" = 200' (To be distributed to all parties at the June 11, 2001 hearing)
- Exhibit No. 8 2000 Aerial photos dated October 2000 of site at scale of 1" = 200' (To be distributed to all parties at the June 11, 2001 hearing)
- Exhibit No. 9 Cop of KCC 16.82 Grading Code
- Exhibit No. 10 Excluded
- Exhibit No. 11 Assessors Map locating Short Plat numbers 379161, 379162, 379163 and 582066
- Exhibit No. 12 Plat documents for Short Plat numbers 379161, 379162, 379163 and 582066
- Exhibit No. 13 Photographs of site dated December 11, 2000
- Exhibit No. 14 Excluded
- Exhibit No. 15 Violation letter dated December 20, 2000
- Exhibit No. 16 Stop Work Order dated December 20, 2000
- Exhibit No. 17 Photographs of site dated January 5, 2001
- Exhibit No. 18 Photographs of site dated January 17, 2001
- Exhibit No. 19 Stop Work Orders posted at two locations, dated January 17, 2001
- Exhibit No. 20 Notice and Order dated January 24, 2001
- Exhibit No. 21 Notice and Statement of Appeal dated February 15, 2001

Exhibit No. 22 Photographs of site dated March 17, 2001

Exhibit No. 23 Notice of Pre-Hearing Conference dated April 5, 2001

Exhibit No. 24 Photographs of site dated April 17, 2001

Exhibits offered by Appellant

Exhibit No. 25 Facsimile dated 6-21-01 from DDES Building Inspection regard Fire Department
ACCESS AND WATER AVAILABILITY REQUIREMENTS FOR SINGLE FAMILY
RESIDENTS

Exhibit No. 26 Withdrawn

Exhibit No. 27 Photograph dated 9-28-90

Exhibit No. 28 Photographs (2)

Exhibit No. 29 Conditional Use Permit dated August 18, 1995

Exhibit No. 30 Photograph

Exhibits offered by DDES

Exhibit No. 31 E-mail from Fred White to Joan Snyder dated June 21, 2001

Entered by Examiner:

Exhibit No. 32 Hand drawn diagram of property prepared during the hearing by Fred White, for
illustrative purposes only

RST:gao

E0001958 rpt